IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 27

BURLINGTON TRUCK LINES, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY BRIEF.

Certificate of Service Appended at Page 12.

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ARGUMENT.

I.

As might have been expected, Appellees' briefs make every effort to make this case appear to turn upon the sufficiency of the evidence to support the conventional administrative findings with respect to public convenience and necessity. In order to accomplish this purpose they freely interpolate their own version of findings of fact which the Commission itself failed to make, and indeed

could not reasonably have made on the record in this proceeding.

More specifically, the Government undertakes to "show that the record contains substantial evidence from which the Commission could conclude that adequate, economical and efficient motor carrier service was not available to a substantial group of shippers and consignees * * * and that this inadequacy of service was not of such a minor or temporary character as to warrant ignoring it" (Government's Brief, p. 11). Curiously enough, this is exactly what the Commission failed to find explicitly, probably for the very good reason that the record would not support such a finding. The closest that the Commission was able to come to such an explicit finding was simply its ultimate conclusion that the evidence "would appear to establish a need for additional motor service within the scope of the instant appliaction between Omaha, on the one hand, and, on the other, Chicago, St. Louis and Kansas City, restricted to points originating at or destined to points in Nebraska" (R. 109).

The significance of the difference between the very general ultimate finding which the Commission made and the specific finding which the Government so subtly interpolates becomes apparent when attention is focused upon certain basic assumptions of fact which the Government introduces in support of its position without the slightest warrant in the record itself. For example, the Government assumes that the two carriers, Burlington Truck Lines and Santa Fe Trail, which the Commission found "generally maintained normal interline relationships with the stockholder carriers" (R. 104) were incapable of handling all of the traffic offered by or consigned to the non-union carriers. The only basis suggested for this assumption is the negative one that "neither the examiners nor the Commission found that Burlington Truck and Santa

Fe Trail provided an adequate substitute service" (Government's Brief, pp. 17-18). This statement not only ignores the obvious principle that it was for the applicant to establish the inadequacy of the already available services, but was also contradicted by repeated statements in Hearing Examiner Sutherland's summary of the evidence that shippers complaining of poor service by some of the interlining carriers had in fact been satisfied when shipments were routed via Burlington or Santa Fe, or would be satisfied if shipments were so routed (R. 30, 34, 36, 40, 41, 42, 45). In short what the evidence showed was that while many of the shippers in this particular area had experienced aggravating delays in their shipments, some of these same shippers had in fact solved their difficulties by shifting the interlining operations to the stronger and more resistant carriers such as Burlington and Santa Fe, while other shippers who had not previously attempted to make such a shift, had no objection to it when the alternative was suggested to them. Nowhere in the record is there a speck of evidence to suggest that the available capacity of Burlington and Santa Fe alone was not amply sufficient to take care of any of the traffic originating from or destined to the stockholder carriers within the scope of the contested grant of authority.

It should also be noted that this available capacity is entirely without reference to the additional capacity made available by what the appellees are pleased to stigmatize as the "belated zeal" of other of the interlining carriers in offering more effective resistance to the Union demands. In addition, Examiner Sutherland specifically found that most of the stockholder carriers had already at the time of the hearing, re-established satisfactory interchange arrangements with a number of the line-haul carriers (R. 64) and that there were only "a few of the applicant stockholders who were having interchange difficulties of any

consequence" (R. 67). To these must be added the additional finding by the Commission itself that "at least one large carrier, Watson Bros. Transportation Co., Inc., changed its policy against interchange with 'unfair' carriers before the close of the hearings herein without experiencing any difficulty" (R. 116).

In the light of these specific findings by the Examiners and the Commission, as well as the failure of the applicant to establish the insufficiency of the alternative services available, it is not surprising that the Commission did not even come close to articulating the conclusion suggested by the Government's Brief that "reliance on a hand-full of interlining carriers with necessarily limited authority and capabilities, in place of the numerous carriers that had interchanged with the stockholder-carriers prior to the service disruption would not be 'adequate' service to shippers and consignees" (Government's Brief, p. 18). Such a finding obviously could not have been made without a factual predicate establishing the available capacity of at least Burlington and Santa Fe, to say nothing of Watson Bros. and others, relative to the amount of traffic which was actually experiencing interchange difficulty. Yet it is a well established rule not only that the burden is upon the applicant to establish the inadequacy of existing available services but also that the shipper has an obligation to seek out such available services before asking for additional service. See *John H. Yourga v. United States*, 191 F. Supp. 373 (1961); *Clyde R. Sauers Extension, East Cambridge, Mass.*, 61 M. C. C. 65, 67 (1952); *Walter C. Benson Co., Inc., Extension*, 61 M. C. C. 128, 130 (1952).

The Government's brief adopts the same technique of ignoring the Commission's findings and substituting its own theory of the case when it deals with the labor aspects of this controversy. Thus it challenges appellant carriers' characterization of the service disruption as "transitory"

on the ground that appellant Union still argues that under *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U. S. 93, and the 1959 Amendment of the National Labor Relations Act (73 Stat. 543) "a protection of rights clause (hot cargo) would not necessarily violate the Labor Act," and adds: "The Commission does not doubt its lack of competence to resolve that controversy" (Government's Brief, p. 23). In thus pouncing gleefully upon an apparent inconsistency between the appellant carriers' and the appellant Union's position, the Government conveniently forgets that it was the Commission's opinion which first relied upon the *Carpenters' Union* case when it said:

> "The prohibition against union-inspired secondary boycotts contained in section 8(b)(4)(A) of the Labor Management Relations Act of 1947 provides protection to the employer even though it is a party to a "hot cargo" agreement, but only in a situation where the employer has not acquiesced in the boycott. Thus, by mere acquiescence in the boycott, the unionized carriers lose the protection which Section 8(b)(4)(A) might otherwise afford them against unfair labor practices prohibited thereby." (See *Carpenters' Union* v. *Labor Board*, 357 U. S. 93.) (R. 117.)

The Government also appears to forget that it was the Commission in its Motion to Affirm which first suggested that the "1959 Amendment of the National Labor Relations Act, which became effective approximately six months after the decision in this case, appears to have obviated the likelihood of a recurrence elsewhere of the particular problem which led to the grant of the certificate" (Motion to Affirm, p. 11).

In referring to the "transitory circumstances of complex labor disputes" the appellant carriers were not asking this Court to be so naive as to believe that appellant Union would meekly relinquish its resolution to enforce the union-

ization of the Nebraska carriers or give up its attempt to enforce the "hot cargo" or "protection of rights" clauses of its contracts, in deference either to the *Carpenters' Union* case or the 1959 amendment to the Labor Act. Indeed, appellants' opening brief called attention to the fact that the immediate effect of the grant of authority to Nebraska Short Line, as indicated by the records of the Labor Board (See Jurisdictional Statement, Appendix D, pp. 190-191), had apparently been to shift the focus of the Union's attack to whatever point Short Line first came into contact with the unionized world around it. The transitory nature of the labor controversy was nevertheless reflected in the increasing effectiveness, as found by the Commission (R. 116), of the resistance of the original interlining carriers to the Union's attempt to require their cooperation in achieving the objectives of the "hot cargo" clauses. The significance of the general legal developments such as this Court's decision in the *Carpenters' Union* case and the 1959 amendment of the statute is that they both tended to strengthen the interlining carriers' powers of resistance and also armed the originating or delivering carriers with a more effective direct remedy against union interference with the interlining operations. Thus the effect of both this Court's decision and the statutory amendment was simply to undermine the Commission's own ill-conceived reliance upon Section 8(b)(4)(A) of the Labor Management Relations Act of 1947 as a justification for its decision (R. 117).

II.

The Government's Brief persists in its vigorous and imaginative rewriting of the Commission's opinion by formulating new justifications for the Commission's rejection of Examiner Sutherland's suggestion that a more appropriate remedy would be a complaint proceeding under Section

204(c) of the Act. In the first place, the Government ignores the obvious relevance of the Commission's own reasoning to a complaint proceeding rather than a certificating proceeding. For example, the Solicitor General does not mention the following explanation offered by the Commission:

> "We do not hold that all instances of refusal to provide service are inexcusable, but in all instances where the failure to provide service is claimed to be excusable, the burden is upon the carrier to show that it did everything in its power to fulfill its obligations to the public and was prevented from so doing by circumstances clearly beyond its control. There is nothing in this record to indicate any such violence or imminent threats thereof which might have constituted the likelihood of danger to the carriers' employees or equipment or any other circumstances which rendered the operation of the carriers' vehicles impossible. On the contrary, the carriers refusing to provide service did little, if anything, in aid of the situation and adopted a policy of following the official or unofficial dictates of the Union without giving any consideration to their obligations as franchised public carriers." (R. 116.)

In short, it was the supposedly supine acquiescence in the demands of the Union which the Commission found particularly inexcusable.

This is a far cry from the Solicitor General's suggestion that the Commission might well have considered "the possibility, for example, that if it ordered the existing carriers to interchange, attempted compliance might so aggravate their labor difficulties so as to cause a complete cessation of operations" (Government's Brief, p. 26). Abstractly considered, the Solicitor General's suggestion might conceivably afford a more reasonable basis for the Commission's decision. The only difficulty with the suggestion is that it is utterly inconsistent with the Commission's own reasoning, as set forth above.

Equally theoretical, and without foundation in the Commission's opinion or the evidence in the record, is the Solicitor General's suggestion that the interlining carriers, if subjected to an order under Section 204(c), might have responded simply by canceling "tariffs voluntarily filed to provide such joint service" (Government's Brief, p. 27). Of course, the Solicitor General is correct in his law in observing that Section 216(a) of the Statute permits a motor carrier to do this with respect to its freight traffic. What he does not explain is how the carriers here involved could have followed such a course on any significant scale without in effect abandoning their claim that they were providing service for the territory here under consideration. It is true that the Solicitor General does pick up one isolated fact in the record which he suggests provides support for his hypothesis. This is the following statement in Examiner Sutherland's Report: "As to Clark, it has received only one cancellation notice on concurrences, from Riss and Company." (R. 29.) The Solicitor General might also have noted that Riss and Company is not a party to these proceedings and is never again mentioned in the record as being in any way concerned with this traffic. So far as appears, Riss has no interest at all either in this controversy or the traffic that is here involved. Presumably if the appellant carriers were equally indifferent, they too might cancel their through tariffs with the stockholder-carriers. It is, however, difficult to conceive of their doing so as long as they have any hope of retaining the traffic and resisting the entrance of a new competitor in the field.

In short, it seems obvious that the "sound reasons" suggested by the Solicitor General "for the Commission to prefer the certification process to the compliance process in meeting the transportation problem presented by this case" (Government's Brief, p. 27) are not the reasons

which the Commission had in mind, nor are they supported by any of the findings or evidence in this case. On the contrary, it seems equally evident that the reasoning of the Commission, with its emphasis upon the failure of some of the carriers to offer appropriate resistance to the Union's demands, points unmistakably in the direction of the more individualized orders under Section 204(c) dealing with such offending carriers. If the Commission did indeed have any reason to doubt the efficacy of such orders, it could also have continued the temporary authority of the applicant until such a remedy had been attempted and there was some factual basis for judging the reality of the Solicitor General's apprehensions.

It is equally inconsistent with the Commission's reasoning, and unrealistic on this record, for the Solicitor General to tell us now that "the certification process is not 'punishment' * * *: its purpose is to adjudicate neither 'guilt or innocence' nor even (by contrast to the compliance process) faithfulness *vel non* to service obligations" (Government's Brief, p. 28). The fact remains that after finding that some of the carriers had failed faithfully to discharge their obligations, without sufficient excuse, the Commission certificated a new carrier to compete with all of them. The new carrier is, of course, not limited to the traffic with respect to which the interlining difficulties occurred; neither is it limited to the traffic originated by or destined to the stockholder-carriers. Although such traffic may be the immediate source of its revenues, the successful applicant is free to branch out and compete for any traffic within the scope of its certificate—that is, all traffic between Omaha, on the one hand, and Chicago, St. Louis or Kansas City, on the other, over certain specified routes, originating at or destined to points in Nebraska. This, as the Examiners found, is the traffic which the protestant carriers have been enjoying; it is also the traffic

for which these carriers, as the Examiners found, have more than sufficient available capacity. Whether or not the operations of Nebraska Short Line have already injured any of the appellant carriers in any substantial amount, can hardly be determined on this record. There can, however, be no doubt, as a result of the Examiners' findings, adopted by the Commission, of the potentiality of such damage so long as the certificate remains outstanding.

It is also pertinent to observe that the certificate granted to Nebraska Short Line is in no way limited to the peculiar circumstances which supposedly justified its issuance. It is true that the applicant stated that "under no conditions" would it ever agree to a union contract containing any hot cargo provisions" and that "it offered, through an amendment, to have any issued certificate contain a provision to the effect that, if it were faced with the alternative of signing such a contract or going out of business, it would surrender its certificate for cancellation" (R. 83). Of course the Commission ignored this offer; its inclusion in the certificate could hardly be justified under the Interstate Commerce Act unless all certificates were so conditioned. For as the Solicitor General now emphatically tells us, it is for the National Labor Relations Board, not the Interstate Commerce Commission, to determine the validity of "hot cargo" or "protection of rights" clauses. Consequently, if such clauses are indeed valid, the successful applicant, like the protestant carriers, may eventually be induced or forced to accept one; or, it may elect instead to transfer its certificate to some other operator committed to unionized labor relations and willing to operate under the same labor contracts as the other interlining carriers. If, on the other hand, the Labor Board eventually determines that such contractual provisions are completely invalid, then even the unionized carriers will have no difficulty in carrying out their normal practice of interchanging free-

ly with the non-unionized carriers. In either event, the issuance of the new certificate will have served no useful purpose except to add a new competitor to serve under the same conditions as the older carriers, irrespective of the continuance of the original difficulties arising from the labor dispute. One could hardly ask for a better illustration of why the issuance of a permanent certificate to a non-unionized carrier was ill-adapted to serve as the solution for "service inadequacies" which the Commission found were occasioned by the labor difficulties and why, at the very least, such a remedy should be used only as a last resort when all other more appropriate avenues of relief, both under the Interstate Commerce Act and under the National Labor Relations Act, have been tried and found wanting.

For the foregoing reasons, as well as those stated in applicant's original brief, the decision of the District Court should be reversed, and the order of the Commission set aside.

Respectfully submitted,

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Proof of Service.

I, David Axelrod, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of October, 1962, I served copies of the foregoing Reply Brief of Appellants on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid, to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with first class postage prepaid, to its respective attorneys of record as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

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